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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 240

J. R. ALABAUGH, W. H. SCHAVER, J. W. WELMAN, C. J. SCHWENNINGER, C. H. SMITH AND C. B. FLEDDERMAN,

Petitioners,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A BODY CORPORATE

AND

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION

AND

GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE BALTIMORE AND OHIO RAILROAD, AN UNINCORPORATED ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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J. R. Alabaugh, W. H. Schaver, J. W. Welman, C. J. Schwenninger, C. H. Smith and C. B. Fledderman pray that a writ of certiorari issue to review the judgment entered in this cause on May 20, 1955, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals (Appendix B) is reported unofficially in 28 Labor Cases, par. 69,261, but has not yet been officially reported. The opinion of the United States District Court for the District of Maryland (printed at p. 34 of Appellants' Appendix in the Court of Appeals, copies of which are furnished with this Petition) is reported in 125 F. Supp. 401, and in 27 Labor Cases, par. 68,823. The decision of the carriers' representative on the final administrative appeal, ordering the discharge of petitioner Alabaugh, appears in Appendix C, *infra* (substantially identical decisions having been rendered with respect to the other petitioners). The first administrative decision in the Alabaugh case appears at p. 23 of Appellants' Appendix in the Court of Appeals.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit, which is here sought to be reviewed, was dated and entered on May 20, 1955. The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED

The questions in the case relate to the doctrine of exclusive primary jurisdiction of administrative tribunals, as depriving the District Courts of jurisdiction which they would otherwise possess, particularly in cases arising under the Railway Labor Act. To state these questions intelligibly, a brief statement of the nature of the complaint, and the novel extension of the principle of exclusive primary jurisdiction proposed by the courts below, is required.

The District Court decided (its decision being affirmed by the Court of Appeals) that it had no jurisdiction of peti-

tioners' suit to restrain their discharge by the carrier, claimed by them to be in violation of an express provision of the Railway Labor Act; the basis of the Court's decision being that such controversy was within the exclusive primary jurisdiction of the National Railroad Adjustment Board.

The discharge of petitioners was ordered at the instance of the Brotherhood of Locomotive Engineers on the ground of non-membership in such union; whereas, prior to their discharge, petitioners had advised the Brotherhood that they were ready and willing to join the union and the Brotherhood had declined to admit them to membership. Thus, the essence of the complaint is that petitioners are being separated from their employment, illegally and in violation of the Railway Labor Act, because of non-membership in the union at a time when membership is not available to them; and the complaint is aggravated by an alleged illegal discrimination by the Brotherhood against these plaintiffs (petitioners) because of their previous activity on behalf of a rival union.

Under the foregoing circumstances, the questions are these:

1. Does the denial of jurisdiction of the District Court, because of supposed primary exclusive jurisdiction of the National Railroad Adjustment Board, violate the long-established rule of this Court that injunctive relief may be obtained against illegal discrimination, in violation of the bargaining agent's statutory duty, without first resorting to administrative tribunals?

2. Where there is no dispute as to the facts, and particularly no dispute as to the interpretation or application of the union shop agreement or any other labor agreement, and the issue is purely one of law as to the application of a

clear provision of the Railway Labor Act itself, is the case properly one for the District Court rather than the Railroad Adjustment Board?

3. Where the administrative procedure set up under the agreement between the carrier and the union has been followed by all parties to the point that a decision on appeal has been rendered against petitioners, which is termed "final and binding" by the agreement (p. 9, *infra*), are the aggrieved employees still permitted, and *even required*, to go to the Railroad Adjustment Board, or have they sufficiently exhausted their administrative remedies so as to be entitled to judicial relief against the violation of their statutory rights?

STATUTES INVOLVED

The Jurisdiction of the District Court.

U. S. Code, tit. 28, sec. 1337, provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The Statute Upon Which Petitioners' Complaint is Based.

U. S. Code, tit. 45, sec. 152 Eleventh, the so-called "union shop amendment" to the Railway Labor Act, which was adopted in 1951, appears in full in Appendix A, *infra*. It authorizes union shop agreements requiring that "all employees shall become members of the labor organization representing their craft or class", and contains the following proviso upon which petitioners' rights in this suit are founded:

> 'PROVIDED, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the

same terms and conditions as are generally applicable to any other member * * *."

STATEMENT OF THE CASE

1. *Basis of Complaint*

The bill of complaint in the case sought to raise in the District Court the question whether, under the union shop amendment, the Brotherhood of Locomotive Engineers is entitled to require the discharge of six railway engineers for non-membership in the Brotherhood, when such engineers are ready and willing to join but are denied membership by the Brotherhood. The theory of the complaint is as follows:

The union shop amendment (45 U.S.C. 152 Eleventh), added in 1951 to the Railway Labor Act, establishes the principle that union membership may be required in a labor agreement as a condition of continued employment. In return for this privilege, however, the union is required to make membership available to employees on the same terms and conditions as are generally applicable to any other member. The language of the proviso referred to is as follows:

> "*Provided,* That no such agreement shall require such condition of employment" (i.e., union membership) "with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member * * *."

The statute thus makes it clear that the union cannot deny membership to an employee and at the same time require his discharge for non-membership.

Further, in view of the plain language of the proviso in the union shop amendment, the plaintiff engineers are protected by statute against discharge by the carrier at re-

quest of the union as long as they are ready and willing to join the union. The union's duty of willingness to admit the employee to membership would seem to be a continuous and subsisting duty, which cannot be escaped or evaded as long as the applicant remains in the employ of the carrier. No sentence or phrase in the Railway Labor Act excuses or justifies the Brotherhood in refusing to admit an employee to membership while at the same time it seeks to have such employee (to whom it bears a trust relationship as bargaining agent) discharged for non-membership. Such duty would seem, further, to be a duty which subsists and continues notwithstanding any prior activity of the employee which may have been hostile to the interests of the particular union and may have caused friction. There is no room in the statute for discrimination against the employee by reason of his prior activities. If membership "*is not available*" to the employee at the time of discharge, he cannot be discharged.

So runs the complaint, based upon the rights guaranteed to petitioners by the union shop amendment to the Railway Labor Act, as quoted.

2. *The Union Shop Agreement, and Proceedings Followed Thereunder.*

Petitioners, plaintiffs in the District Court, are locomotive engineers employed by the respondent Baltimore and Ohio Railroad (hereinafter called the carrier). Respondent Brtherhood of Locomotive Engineers (hereinafter called the Brotherhood) is the labor organization representing petitioners' craft or class. The carrier and the Brotherhood entered into a union shop agreement effective November 1, 1951 (pertinent portions of said agreement appear at page 7, *infra;* the agreement is printed in full in the Appendix to Appellants' Brief in the Court of Appeals, at pages 13-

20). Each of the petitioners was at that time a member in good standing of the Brotherhood and continued in such membership for nine months or more.

On or about August 31, 1952, petitioners terminated their membership in Brotherhood and joined United Railways Operating Crafts (UROC), a rival union, believing it to be a labor organization having the necessary statutory qualifications which would satisfy the requirements of the Railway Labor Act so as to preserve their employment with the carrier. The respondent General Committee of Adjustment of the Brotherhood on the B. & O. (hereinafter called the Committee), which represents the Brotherhood in such matters, thereupon demanded that the carrier discharge petitioners, alleging that because they were not members of the Brotherhood, they were in violation of the union shop agreement. Petitioners demanded and received a hearing before the carriers' representative, as permitted by such agreement.

The administrative procedure under the agreement, as regulated by Section 5 thereof, is as follows:

> "Sec. 5(a). Each and every employee covered by this agreement shall be considered by the Carriers to have complied with the requirements of this agreement, or as having been denied membership in the Brotherhood, unless the Carrier is advised to the contrary in writing in the manner hereinafter provided for. The Brotherhood shall at all times be responsible for initiating any action or proceedings to enforce the terms of this agreement and the Carrier shall have no responsibility with respect thereto.
>
> "(b). The Brotherhood will notify the employing Carrier in writing of any employee who by reason of failure to comply with the terms of this agreement is not entitled to continue in employment. Upon receipt of such notice, the Carrier will, as promptly as possible, but within ten (10) calendar days of such receipt, so

notify the employee concerned in writing by registered mail, return receipt requested, or by personal delivery evidenced by receipt. Copy of such notice shall be given the Brotherhood. Any employee so notified who disputes the fact that he has failed to comply with the terms of this agreement, shall, within a period of ten (10) calendar days from the date of such notice, request the Carrier in writing to accord him a hearing. Upon receipt of such request, the Carrier shall set a date for hearing which shall be held within ten (10) calendar days of the date of receipt of request therefor. Notice of the date set for hearing shall be promptly given the employee in writing by registered mail, return receipt requested, or by personal delivery evidenced by receipt. Copy of notice of such hearing shall be given to the Brotherhood, and a representative of the Brotherhood shall attend and participate in the hearing. The receipt by the Carrier of a request for a hearing shall operate to stay action on the termination of employment until the hearing is held and the decision of the Carrier is rendered. In the event the employee concerned fails to request a hearing as provided herein, the Carrier shall proceed to terminate his employment and seniority in his class or craft not later than thirty (30) calendar days from receipt of the above described notice from the Brotherhood, unless the Carrier and the Brotherhood agree otherwise in writing.

"(c). The Carrier shall determine on the basis of the evidence produced at the hearing whether or not the employee has complied with the terms of this agreement, and shall render a decision accordingly. Such decision shall be rendered within ten calendar days of the hearing date and the employee and the Brotherhood shall be promptly advised thereof. If the decision is that the employee has not complied with the terms of this agreement, his employment and seniority in his class or craft shall be terminated within ten (10) calendar days of the date of said decision, unless the Carrier and the Brotherhood agree other-

wise in writing. If the decision of the Carrier is not satisfactory to the employee or to the Brotherhood it may be appealed directly to the highest officer of the Carrier designated to handle such appeals. Such appeal shall be taken within ten (10) calendar days of the date of the decision appealed from, and if taken, shall operate to stay action on the termination of employment, until the decision on appeal is rendered. The Carrier shall promptly notify the other party in writing of any such appeal. The decision on such appeal shall be rendered within ten (10) calendar days of the date the appeal is taken, and the employee and the Brotherhood shall be promptly advised thereof. If the decision on such appeal is that the employee has not complied with the terms of this agreement, his employment and seniority in his class or craft shall be terminated within ten (10) calendar days of the date of said decision, unless the Carrier and the Brotherhood agree otherwise in writing. Such decision on appeal shall be final and binding unless proceedings are instituted by the Brotherhood within fifteen (15) days from the date of such decision for further handling of the case under Section 8 of this agreement. The institution of such proceedings shall operate to stay action on termination of employment until the dispute is disposed of under the provisions of Section 8. * * *"

(Section 8, above referred to sets up a System Board of Adjustment to determine disputes between the Carrier and the Brotherhood.)

While the question of the status of UROC was being considered in litigation throughout the country, the carrier deferred decision on petitioners' cases. On August 11, 1954, the carrier's representative, who had held a hearing on the matter in 1952, notified petitioners that their employment would be terminated as of August 20, 1954. On August 16 petitioners appealed to the carrier's representative designated to hear such appeals.

On August 23, prior to the final hearing by the carrier, petitioners applied to the Brotherhood for reinstatement in membership, explaining that they had left the Brotherhood to join UROC in the belief that it was "national in scope", and in view of developments in the litigation on that question they desired to be reinstated in the Brotherhood.

The hearing on appeal was held by the carrier on September 1, 1954, and petitioners at the hearing renewed their request to be admitted to membership in the Brotherhood.

The Brotherhood denied the request, but at the same time continued to press the carrier to discharge petitioners. The carrier's hearing officer on appeal thereupon ordered the discharge of petitioners as of October 8, 1954, for non-compliance with the union-shop agreement, that is, non-membership in the Brotherhood.

Thus, at the time when the carrier finally acted and at the time fixed for their discharge, membership in the Brotherhood was "not available" to petitioners. They had applied for membership and their request had been denied. Hence, the statutory right of petitioners to remain as employees of the carrier, notwithstanding their non-membership in the Brotherhood, was fully ripened and matured, under the undisputed facts, which are conceded on this record.

3. *Discrimination Against Petitioners.*

The complaint specifically charges that the failure of the Brotherhood to admit or reinstate petitioners to membership in the union was motivated by discrimination against them because of their activity on behalf of the UROC. The facts relating to such discrimination are pleaded as follows:

> "17. The plaintiffs' request for admission to and reinstatement in the defendant organization, Brotherhood of Locomotive Engineers, was ignored and re-

jected by the said defendant because the plaintiffs had previously joined the United Railroad Operating Crafts, a competing railway labor organization and were active therein. That the said defendant labor union did reinstate other members who had joined the said rival union because they were not considered to be so active therein. That the said defendant labor union has a policy of reinstating members on application whom it considers to be in arrears in dues and assessments. That the course of conduct of the said defendant towards the plaintiffs is discrimination and is contrary to the Railway Labor Act and particularly to subsection 11(a) thereof (45 U.S.C.A. 152(11)(a)). That the charge of discrimination against the plaintiffs was made known to the defendant, the Baltimore and Ohio Railroad, by the plaintiffs particularly on September 1, 1954, at the aforementioned hearing, but that the said Defendant nevertheless ordered the discharge of the plaintiffs as aforesaid."

Under the Railway Labor Act the bargaining agent has the duty to represent all members of the craft or class fairly, equally and without discrimination. Upon petitioners' request for reinstatement in the Brotherhood, it became the duty of the Brotherhood to respect their right to continued employment, and either desist from efforts to have them discharged or admit them to membership, which would automatically have put an end to the proceedings. The Brotherhood did neither, but, while admitting to membership others who had joined the rival union, elected to discriminate unlawfully against these petitioners, who were entitled to look to their bargaining agent for representation and assistance.

4. *Finality of Administrative Decision.*

Since the decision of the carrier on the appeal hearing was favorable to the Brotherhood's illegal policy, it had no reason to carry the proceedings further, under Section 8 of

the agreement, to the System Board of Adjustment. Therefore, the provision of Section 5(c) was applicable, that "such decision on appeal shall be final and binding * * *."

5. *Rulings of the Courts Below.*

On October 8, 1954, the date fixed for their discharge, petitioners brought this suit for an injunction against such discharge. An injunction *pendente lite* was granted by Judge Thomsen in the District Court.

On motion to dismiss the complaint, filed by the Committee (there being no pleadings filed by either the Brotherhood or the carrier), the District Court decided that it had no jurisdiction and entered an order dismissing the complaint, on November 5, 1954. In view of the irreparable injury to petitioners through loss of their employment, the District Court, however, upon being advised that petitioners would appeal, entered an injunction against their discharge pending decision on appeal.

The Court of Appeals for the Fourth Circuit affirmed the trial court's decision dismissing the complaint, but upon application of petitioners has stayed its mandate pending the decision of this court, so that the injunction is still in force, and petitioners, therefore, have continued in their employment as engineers of the carrier to and including the present time. They likewise have not withdrawn their offer to rejoin the Brotherhood if admitted by it.

6. *Jurisdiction of the District Court.*

The jurisdiction of the District Court is based on the fact that the case arises out of an Act of Congress regulating commerce. U. S. Code, tit. 28, Sec. 1337. The statute out of which the case arises is U. S. Code, tit. 45, Sec. 152 Eleventh, a portion of the Railway Labor Act.

REASONS FOR GRANTING THE WRIT

I.

Conflict with U. S. Supreme Court Decisions

The principal reason for granting the writ is that the decision of the Court of Appeals, sought to be reviewed, appears to be in direct conflict with the decisions of this Court in *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226 (1944) and *Tunstall v. Brotherhood of Locomotive Engineers*, 323 U. S. 210, 65 S. Ct. 235 (1944), as explained in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950) and *Ford Motor Company v. Huffman*, 345 U. S. 330, 73 S. Ct. 681 (1953).

In the case of *Steele v. Louisville & N. R. Co., supra*, 323 U. S. 192, 65 S. Ct. 226 (1944), this Court sustained jurisdiction over the suit of an employee, based on a statutory right under the Railway Labor Act to require his bargaining agent to deal fairly and without discrimination in representing all members of the craft or class. Against the contention that the courts should not take jurisdiction because the employee had not first applied to the Railway Adjustment Board, this Court emphasized the following factors:

1. *Case Not Within Previously Recognized Jurisdiction of Board.*

First, the administrative tribunals set up by the Railway Labor Act, that is, the Adjustment Board and the National Mediation Board, are concerned with (a) jurisdictional disputes,[1] (b) questions as to who is entitled to represent

[1] Citing *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 64 S. Ct. 95; *General Committee v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323, 64 S. Ct. 146; *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 64 S. Ct. 142; *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715, 64 S. Ct. 260; Id., 320 U. S. 816, 64 S. Ct. 435.

the craft or who are members of it,[2] and (c) "differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board". A dispute arising out of the employee's statutory right not to be discriminated against, the Court indicated, is not within these recognized categories of administrative jurisdiction.

2. *Statute Granting Board Jurisdiction Does Not Refer to Disputes Between Employee and His Bargaining Union.*

Second, the statute in referring to the Adjustment Board "'disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements' makes no reference to disputes between employees and their representative".[2a]

3. *Adjustment Board Likely to Decline Jurisdiction.*

Third, the Adjustment Board not only could not give the full relief sought, but has declined to intervene in over 400 cases of individual grievance claims;[3] and even if it could be compelled to entertain the claim, the Court could not say that there was an effective remedy available, or that a proceeding to compel an administrative remedy would be prerequisite to relief in equity.

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[2] Citing *Switchmen's Union v. National Mediation Board, supra,* and *General Committee v. Missouri-Kansas-Texas R. Co., supra.*

[2a] *Steele v. R. R., supra,* 323 U. S. at p. 205.

[3] The brief of the Committee in the Court of Appeals in the present case contends that the Adjustment Board has subsequently entertained individual grievances but does not cite a single case in which an individual's complaint was entertained when opposed by his bargaining agent. The B. & O. cited one case in which the Brotherhood was claimant against an individual, requesting his discharge for non-membership, and the Brotherhood's claim was sustained on the ground that UROC was not "national in scope."

4. *Hearing Before Board Not Adequate Remedy.*

Fourth, because of the make-up of the Adjustment Board, as representing only the carriers and the unions, and the further option possessed by the carrier and the union to supersede the Board by setting up a regional board of adjustment selected by them, a hearing before either of these tribunals, if available, could not be said to constitute an adequate administrative remedy.

All of the above four points are equally applicable to the instant case.

The basis of the discrimination in the *Steele* case was that the petitioner was a negro; that is, the discrimination was on racial grounds. But there is no indication whatever in the majority opinion of the Court (concurred in by all justices except Mr. Justice Murphy) which in any way limits the decision to facts involving racial discrimination. The entire basis for the decision was that a right provided under a Federal statute was being violated, the right to fair and non-discriminatory representation by the bargaining agent. In other words, the power of the bargaining representative was determined to be a power held and administered in trust for the benefit of all members of the craft, under the terms of the Railway Labor Act.

The fact that the decision rests on such broad statutory and equitable grounds is further demonstrated by the companion case of *Tunstall v. Brotherhood of Locomotive Engineers*, 323 U. S. 210, 65 S. Ct. 235 (1944), which was decided the same day. In the *Tunstall* case the decision sought to be reviewed was a judgment of a Federal court, in a proceeding in which there was no diversity of citizenship, and it was necessary to find that a right was claimed under Federal law in order to sustain jurisdiction. This Court concluded specifically that the case was one arising out of

an Act of Congress regulating commerce, that is, the provisions of the Railway Labor Act defining the bargaining agent's obligations, as the basis of sustaining Federal jurisdiction. In all its other features the case was substantially identical with the *Steele* case; and the Court referred to the opinion in that case for detailed discussion of the points common to both. Because of the question as to Federal jurisdiction, this case cannot be rested on any basis except that a statutory right, derived from the Railway Labor Act, is justiciable by the Courts without prior administrative action.

In the *Steele* case and in the *Tunstall* case, therefore, the basis of the decisions was not that there was racial discrimination, but that the bargaining agent had violated a statutory duty to act fairly and without discrimination for the benefit of all those represented by it. Indeed, Mr. Justice Murphy, in his concurring opinion in the *Steele* case, complains that the majority seem not to have dealt with the case exclusively as one of racism, in violation of the Constitution, but chose rather to "decide the case and to analyze the statute solely upon the basis of legal niceties".

Subsequent decisions of this Court leave no doubt as to the basis of the *Steele* case and the continuing full force and effect of its reasoning.

In *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950), a case involving a jurisdictional dispute between two unions, each having a collective bargaining contract with the carrier, interpretation of which was directly involved and was the only matter in dispute, this Court held, in full agreement with the opinion in the *Steele* case, that the Railroad Adjustment Board had primary exclusive jurisdiction. It distinguished the *Steele* case, not on the ground of racism, but by saying:

> "We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 65 S. Ct. 226" (See 339 U. S. at p. 244, 70 S. Ct. at p. 580, note 7).

The Court's decision is, in effect, summed up in this one sentence, to which the above note was appended:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved" (i.e., union jurisdictional disputes based on the interpretation of collective bargaining agreements) "is exclusive".

In *Order of Railway Conductors v. Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585, decided the same day as the *Slocum* case, the Court held that a dispute between certain railroad conductors, backed by their union, and the railroad as to whether the conductors were entitled to extra pay for certain services under the collective bargaining agreement, was within the exclusive primary jurisdiction of the Adjustment Board. Therefore, a declaratory judgment suit brought by the railroad against the union in a State Court was improperly entertained. Again, the dispute rested solely upon interpretation of the bargaining agreement, there being no statutory right involved.

These four cases — *Steele, Tunstall, Slocum* and *Railway Conductors* — fully illustrate the clear criteria recognized by this Court as to when the Railroad Adjustment Board should be accorded exclusive primary jurisdiction and when the courts should take jurisdiction.

If the dispute is between the carrier and the union and involves interpretation of an agreement between them, or interpretation of two contracts involving different unions, so as to resolve a jurisdictional dispute, the Board is the

appropriate tribunal. If, however, the case involves a clear statutory right of an individual, in which the union is the adverse party violating the statute, and in which, therefore, his interest directly conflicts with that of his bargaining representative, the Board is not an appropriate tribunal, there is no adequate administrative remedy and the courts should take jurisdiction to protect and uphold the employee's statutory right.

More recently, the *Steele* and *Tunstall* cases were referred to by this Court in terms which left no doubt that the principle of these cases applies to all discriminations forbidden by law, not merely to those based on race, creed or color.

In *Ford Motor Co. v. Huffman,* 345 U. S. 330, 73 S. Ct. 681 (1953), an employee sought relief against an alleged illegal discrimination by which his seniority rights were adversely affected in favor of others who were given credit for pre-employment military service, in addition to the credit required by law for post-employment service. The principal issue considered by this Court arose under the National Labor Relations Act, under which the bargaining agent was recognized to be under the same duty as under the Railway Labor Act to represent all employees of the unit without discrimination. Violation of such duty by the bargaining unit would be an "unfair labor practice" which could be considered by the National Labor Relations Board.

This Court considered and decided the case on its merits in a very full decision upholding the discrimination as fair and reasonable. While not specifically deciding that the District Court had jurisdiction notwithstanding the possible reference of the question to the Labor Relations Board, this Court said (footnote 4, 345 U. S. at p. 332):

"In No. 194, International also questions the jurisdiction of the District Court. International recognizes that one issue in the case is whether it engaged in an unfair labor practice when it agreed to the allowance of credit for pre-employment military service in computations of employment seniority. It then argues that the National Labor Relations Act, as amended, 61 Stat. 146, 29 U.S.C. (Supp. V) 160(a), 29 U.S.C.A. 160(a), vests the initial jurisdiction over such an issue exclusively in the National Labor Relations Board. This question was not argued in the Court of Appeals nor mentioned in its opinion and, in view of our position on the merits, it is not discussed here. Our decision interprets the statutory authority of a collective-bargaining representative to have such breadth that it removes all ground for a substantial charge that International, by exceeding its authority, committed an unfair labor practice. As to a somewhat comparable question considered in connection with the Railway Labor Act, 45 U.S.C.A. 151 et seq., see Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187; Steele v. Louisville & N. R. Co., 323 U.S. 192, 204-207, 65 S. Ct. 226, 232-234, 89 L. Ed. 173."

We submit that the Court's reference to the *Steele* and *Tunstall* cases, in the context in which it appears, is a clear recognition of the fact that they deal with forbidden discriminations generally, and not merely with discriminations based on racial grounds. Thus, unless the differences between the National Labor Relations Board (an impartial body) and the Railroad Adjustment Board (a body composed only of carrier and brotherhood representatives) should have led the Court to a different conclusion, it is a fair inference that it would have sustained the District Court's jurisdiction in the *Ford Motor* case on the authority of the *Steele* and *Tunstall* cases.

Basic Error of Court of Appeals in Viewing Steele Case.

That the Court of Appeals, in the present proceeding, misconceived the ground of decision in the *Steele* and *Tunstall* cases is apparent from the following extract from its opinion:

> "Plaintiffs rely upon *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U. S. 210, and *Brotherhood of Railway Trainmen v. Howard*, 343 U. S. 768; but those cases dealt with racial discrimination, as to which the courts were well qualified to grant relief and which involved none of the matters of collective bargaining which the Adjustment Board was set up to handle."[4]

Then, quoting a passage from the *Steele* opinion which justifies legitimate discrimination based on "authorized purposes of the contract * * * such as differences in seniority, the type of work performed, the competence and skill with which it is performed", the court says that these factors explain "the distinction between the racial discrimination dealt with in these cases" (i.e., *Steele, Tunstall* and *Howard*) "and the sort of discrimination charged here". Such reasoning ignores the basic charge of the bill of complaint that the discrimination against petitioners in this case is not legitimate, but is in direct violation of their statutory rights under the Railway Labor Act.

Next, the court makes the following significant admission:

> "Logically it may seem that if a court has jurisdiction to protect rights against racial discrimination it should have jurisdiction to protect them against discrimination on account of union membership * * *."

[4]This and the next paragraph of the Court's opinion are taken verbatim from its earlier opinion in *Spires v. Southern Railway Co.*, 204 F. 2d 453 (C. A., 4th Circ.). Thus the Court of Appeals has twice made the error of confining the *Steele* and *Tunstall* cases to racial violations.

This contention the court attempts to answer by suggesting that the "Adjustment Board was not set up to deal with racial controversies, but controversies arising out of labor relationships". Thus, finally, the Court of Appeals returns to its basic error of limiting the *Steele* and *Tunstall* decisions to cases of racial discrimination, when this Court placed them upon the broad ground of violation of statutory rights as conferring jurisdiction on the District Court as a court of equity.

In the present case the following facts should be emphasized:

1. The controversy does not involve interpretation of the agreement but, rather, the interpretation of the statute.[5] There are no "words of art" to be resolved, like the phrase "national in scope", as applied to a union, which has caused courts in a group of cases to decline jurisdiction to determine the status of UROC, some courts concluding that the Adjustment Board or a system board should determine the question, others that it is dependent on a proceeding by UROC, supervised by the Mediation Board, to be accredited as a union entitled to appoint representatives to the Adjustment Board.[6] There is no dispute here as to the facts of

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[5] True, the agreement incorporates the words of the statute to the effect that an employee shall not be required "to become or remain a member of the Brotherhood if such membership is not available to such employee upon the same terms and conditions as are generally applicable to other members * * *," but this can scarcely convert a question of statutory interpretation into one of interpretation of an agreement.

[6] *Johns v. Baltimore & O. R. Co.*, 118 F. Supp. 317 (three-judge court dissolved), aff. 347 U. S. 964 (mem.), 74 S. Ct. 776; *United R. O. C. v. Wyer*, 115 F. Supp. 359, aff. 205 F. 2d 153, cert den. 347 U. S. 929; *United R. O. C. v. Northern Pac. R. Co.*, 208 F. 2d 135, cert. den. 347 U. S. 929; *United R. O. C. v. Pennsylvania R. Co.*, 212 F. 2d 938; *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949, cert. den. 347 U. S. 944. All of the above cases involved the question whether UROC was a union "national in scope", a question of labor phraseology not involved here. The *Johns*, *Wyer* and *Northern Pacific* cases held that this question was within the exclusive primary jurisdiction of the NRAB; the *Pennsylvania R. Co.* case found it should be decided, instead, by a system board set up under the agreement; and the *Pigott* case held that, although there was a system board, the UROC could not be considered "national in scope" unless it had first

the controversy or as to the meaning or application of the agreement. Insofar as the agreement may exceed statutory authority, as in its maintenance of membership provisions, the validity of the agreement is involved, but any issue of legal validity of the agreement would be clearly justiciable by the courts under the *Steele* case.

2. The bargaining representative here, as in the *Steele* case, has violated its duty to treat all employees fairly and has discriminated against petitioners,[6a] refusing to readmit them to membership and thus preserve their employment, by reason of bias against them due to their prior activity for a rival union.[7]

3. Petitioners and the union are in an antagonistic position, thus rendering the Board an inappropriate tribunal, hearing before which would not constitute an adequate administrative remedy.

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been certified to appoint representatives to the NRAB, in a special-board proceeding under Section 153 of the Act. Thus, substantial confusion obviously exists as to the jurisdiction of the various boards.

All of these cases are distinguishable from the present case, since here petitioners assert an illegal discrimination in clear violation of the plain words of the statute, and the dispute is solely between individual employees and their bargaining agent.

[6a] Certain of the UROC cases cited in Note 6 attempt to distinguish the *Steele* case by narrowing its application to illegal discriminations in the making of the bargaining agreement. We do not find the principle to be so qualified, either in this Court's opinion in the *Steele* case or in its subsequent opinions. Nevertheless, such attempted distinction would be unavailing in the present case, for the following reasons:

It will be noted that the agreement, as construed by the Brotherhood and the carrier in this case, permits the discharge of petitioners even after they have applied for membership in the Brotherhood and such membership has been denied. So construed, the agreement itself is illegal and is in violation of the statutory proviso. Petitioners, therefore, complain not only of discriminatory conduct by their bargaining representative in the administration of the agreement but in the initial negotiation of an illegal agreement condemned by the statute.

Viewed in this light, the present case — which is within the principle of the *Steele* case on any theory — becomes indistinguishable from it on the facts.

[7] It will be observed that the carrier delayed decision on the first administrative hearing for approximately two years, pending clarification of the status of UROC. By the same token, petitioners were justified in their delay in reapplying for membership in the Brotherhood, as until the status of UROC was clarified, they believed in good faith that they were entitled to belong to such union without losing their employment.

A final convincing fact, not present in the *Steele* case, is that, before applying to the District Court, petitioners defended their rights through two administrative hearings under the procedure set up by Section 5 of the union shop agreement. The decision rendered by the carrier's representative on appeal was "final and binding" by the express terms of the agreement.

As a result:

1. That the Adjustment Board would take jurisdiction is rendered even more doubtful than in the *Steele* case, (a) because the agreement terms the administrative decision already made "final and binding"; (b) because the administrative hearings by the carrier are subordinated by Section 5 to the supervisory jurisdiction of the system board of adjustment created under Section 8, if the Brotherhood chooses to appeal, and the creation of the system board deprives the Adjustment Board of jurisdiction over any controversies appealable to the system board;[8] and (c) because Section 7 of the agreement denies that the agreement may be made the basis of any "grievance * * * claim".

2. Should the Adjustment Board take jurisdiction and sustain, as it obviously would, the "final and binding" administrative decision already made, there would be no appeal to any court authorized by the statute, as the case is not one of a "money award" (45 U.S.C. Section 153, first (n)); and it is doubtful if any court would review the decision in the face of the statute where two *"final and binding"* administrative decisions had already been rendered.

[8] Where a system board of adjustment is created, as permitted by 45 U. S. Code Sec. 153 Second (Railway Labor Act), its jurisdiction has been legally determined to be exclusive of that of the National Railroad Adjustment Board. *Atlantic Coast Line R. Co. v. Pope* (C. C. A. 4th), 119 F. 2d 39 (1941); *Primakow v. Railway Exp. Agency* (D. Ct. E.D. Wis.), 56 F. Supp. 413 (1943); *Dwellingham v. Thompson* (D. Ct. E.D. Mo.), 91 F. Supp. 787 (1950), aff. 198 F. 2d 591 (C.A. 8th, 1952).

Thus, any further administrative remedy is precluded by the agreement; and the effect of denial of jurisdiction of the District Court is to preclude all judicial remedy for the statutory violation complained of, now or in the future.

Conclusion as to Conflict with Steele and Tunstall Cases. From the foregoing it appears that the controlling reasons stated by this Court for its decision in the *Steele* case are applicable here:

1. This case is not within the previously recognized jurisdiction of the Adjustment Board, confined largely to jurisdictional disputes and grievances and other differences arising in the interpretation of the bargaining agreement;

2. The statute fixing the Adjustment Board's jurisdiction omits all reference to "disputes between employees and their representative", the type of dispute here involved;

3. The Adjustment Board's record indicates a strong disinclination to deal with individual grievance claims (the briefs of appellees in the Court of Appeals failing to cite a single case in which jurisdiction was taken by the Board over the objection of the bargaining agent);

4. The make-up of the Board is such that a hearing before it, in a case in which the individual employee finds the Brotherhood and the carrier aligned against him, as here, could not be said to constitute an adequate administrative remedy.

Moreover, the facts of the present case invoke judicial jurisdiction more strongly than in the *Steele* case because of the administrative procedure followed prior to the filing of the bill of complaint. Here, the parties have had their administrative "day in court" in two hearings, pursuant to

Section 5 of the union shop agreement. Petitioners, prior to filing their bill of complaint, were faced with an adverse administrative decision, on appeal, which is "*final and binding*" under the express terms of the union shop agreement invoked by the Brotherhood.

II.

Conflict with District Court Decision in District of Columbia.

Not only is the decision below in conflict with the cases in this Court noted above, but a court of first impression in another appellate circuit (District of Columbia) appears to have taken an opposing position in a case involving discrimination on somewhat similar grounds to those present in this case.

In *Hargrove v. Brotherhood of Locomotive Engineers*, 116 F. Supp. 3, 24 Labor Cases, par. 67,977, Judge Pine held that a claim of arbitrary discrimination against certain employees, an engineer and a fireman, in alleged violation of the Railway Labor Act, was within the jurisdiction of the District Court. The plaintiffs had been employed in the operation of the Government-owned railroad on the Oak Ridge reservation, which was subsequently taken over by the Louisville & Nashville Railroad. The bargaining agreement negotiated by the Brotherhood and the Railroad cancelled or ignored certain seniority rights of the plaintiffs and others employed on the reservation.

The District Court's opinion cited, and quoted extensively from, the *Steele* case and said:

> "Here the discriminations based on prior employment and geography alone are also irrelevant and invidious. * * *.
>
> "Although the Steele and related cases involved racial discrimination, an analysis of the opinions makes it clear that jurisdiction of the courts was not depend-

> ent on that element exclusively, but related to their power to determine whether or not the statutory duty to represent all of the employees equally had been met. Compare Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, where no racial question was involved."

The District of Columbia Court therefore held that it would take jurisdiction, and that the controversy was not one within the exclusive jurisdiction of the Adjustment Board. It concluded:

> "Indeed, it might be difficult to find a constitutional basis for relegating this controversy to the Railway Adjustment Board as contended by defendants, and such procedure appears particularly abhorrent when it is considered that the defendants named herein participate in making the selections on the Board, who would pass upon the validity of their acts charged to be in disregard of the trust imposed upon them."

The *Hargrove* case was, unfortunately, not appealed to the Court of Appeals, so that at the moment there is no conflict between Courts of Appeal as to the applicability of the *Steele* case and related cases to non-racial discriminations. Nevertheless, it is submitted that Judge Pine's opinion is clearly correct, and that of the Court below erroneous, in limiting *Steele* to racial discriminations; and that such conflict is an added reason for this Court to take jurisdiction and clarify the confused state of the law on this point.

III.

Importance of Issues in Administration of Railway Labor Act.

The number of cases cited in the opinion of this Court in *Steele v. Louisville & N. R. Co., supra,* and other opinions herein referred to, and the number of cases in the District Courts and United States Courts of Appeals which involve

the extent and limitations of the doctrine of exclusive primary jurisdiction of administrative boards, under the Railway Labor Act alone, indicate the frequency with which these issues are presented and the lack of order now prevailing among the decisions.

This Court has never sanctioned the policy of relegating individual complainants of statutory violation to administrative boards, representing exclusively the carriers and the Brotherhoods, where the sole and significant dispute presents a conflict of interest between the individual employee and his bargaining representative. In the *Steele* case the Court held that this factor was material in determining the jurisdiction of the District Courts.

Nevertheless, the doctrine of the *Steele* case, though fully recognized in the decisions of this Court, has been whittled away and nibbled at here and there by lower Federal courts until the injured employee does not know whether and under what circumstances he must apply to the Adjustment Board or a system board; whether the carrier's decision against him is "final and binding", as it purports to be, so that no administrative board will entertain his claim; or whether the Courts will review an administrative decision purporting to be "final and binding" — be it a decision of the carrier under the agreement or of the National Railroad Adjustment Board itself.

Often, as in the present case, to relegate such controversies to the Adjustment Board or a system board is, as Judge Pine stated in the *Hargrove* case, "particularly abhorrent when it is considered that the defendants * * * participate in making the selections on the Board, who would pass upon the validity of their acts charged to be in disregard of the trust imposed upon them."

The Railway Labor Act is a relatively early enactment and, unlike the National Labor Relations Act, it contains no provision for judicial review of administrative decisions, except in cases of money awards. Yet it is obvious that at some point in the process of adjudication courts must be able to consider whether legal rights have been recognized or trampled upon.

One of the purposes of the Railway Labor Act is "to forbid any limitation upon freedom of association among employees". U. S. Code, tit. 45, Sec. 151a. Likewise, "employees shall have the right to organize and bargain collectively through representatives of their own choosing". U. S. Code, tit. 45, Sec. 152 Fourth. Doubtless, these rights were intended to be somewhat curtailed by the union shop amendment, Sec. 152, Eleventh, but the extent to which such general rights can be preserved and the two policies reconciled is a matter for judicial determination and judicial statesmanship.

Surely, reconciliation of conflicting statutory policies on a broad and fair basis cannot be expected of an administrative board when any decision in favor of an employee as against the established unions would be against the interest and security of the union board members and of all the "national in scope" unions which participate in their selection and pay their salaries. Equally, the carrier representatives on such boards are subject to economic pressure, direct or indirect, from the unions, so that they also are not free to take a broad view of these questions.

Today, under the instant case and other decisions of the inferior courts, the employee is permanently bound to the existing and established unions. No new organization can ever be formed and offer its facilities as bargaining agent if no employee can safely join a new union until it is first

established as bargaining agent. For if he joins such a new union he must do so at peril of loss of his job; if the new organization fails immediately to qualify, its members have no right to return to the established Brotherhood, except by the grace and "generosity" of the Brotherhood, under these decisions.

In joining a new union an employee must necessarily either resign from the Brotherhood, which jeopardizes his job beyond recovery; or he may incur the financial burdens of dual unionism, which would doubtless still subject him to discharge. See *Colgate Palmolive Peet Co. v. NLRB*, 338 U. S. 355, 70 S. Ct. 166, establishing a rule which would apparently apply under the Railway Labor Act (this case arising prior to the effective date of the Taft-Hartley Act provision forbidding discharge for dual unionism).

Where, under such a system, is the right of "freedom of association"? Where is the right to "bargain collectively through representatives of their own choosing", which must imply some degree of freedom to create a new organization?[9]

In the face of the conflict between the employee's "freedom" and the union shop amendment, is it not a minimum duty of the courts to take cognizance of claims of statutory

[9] For example, Section 152 Eleventh (c) contains two clauses relative to employees joining other organizations. The first states that the requirement of membership in a labor organization in a union shop agreement shall be satisfied if the employee is a member of "any one of the labor organizations, *national in scope*, organized in accordance with this act" and admitting to membership employees of his craft or class. A subsequent clause provides that nothing in the act or in a union shop agreement shall "prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class" in such services. The second clause about changing membership omits the requirement that the organization to which the employee transfers must be "national in scope". If this phrase is omitted by design, then presumably Congress intended to permit free transfer to new organizations. This would require that the employee should not be discharged for changing to such an organization, or at least should have a period of time in which to re-apply for membership in the established bargaining union.

rights, to interpret the Railway Labor Act fairly and so as to preserve as much of it as may be preserved, and to protect the many thousands of railroad workers who desire only to perform their duties honestly and fairly and earn their living by exercising those skills which they have developed through years of service in a specialized trade?

We respectfully submit that it is the duty of the Federal courts to resolve the confusion which now exists; to endeavor to lay down a line of demarcation between administrative jurisdiction and judicial jurisdiction, at least as cases are presented and until the major issues have been resolved and broad lines of policy emerging under the union shop amendment have been ascertained and stated.

In view of this confusion and uncertainty due to —

(1) Possible conflicts in the wording of the Railway Labor Act;

(2) Silence of the Act as to procedures;

(3) Silence of the Act as to appeals in cases not involving monetary awards, and conflict in the decisions of the courts with respect thereto;

(4) Lack of review of decisions involving job rights and other property rights; and

(5) Fundamental questions relating to the means and jurisdiction for enforcing constitutional and statutory rights —

we respectfully urge this Court to grant the writ of certiorari because this case presents serious questions concerning the administration of the Railway Labor Act.

Respectfully submitted,

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APPENDIX A

U. S. CODE, TIT. 45, SEC. 152 ELEVENTH

Notwithstanding any other provisions of this chapter, or of any other statute of law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted —

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: PROVIDED, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of employees, of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: PROVIDED, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after

the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deduction from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: PROVIDED, However, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: PROVIDED, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6955

J. R. Alabaugh, W. H. Schaver, J. W. Welman, E. J. Schwenninger, C. H. Smith, and C. B. Fledderman,
Appellants,

vs.

The Baltimore and Ohio Railroad Company, a body corporate, and Brotherhood of Locomotive Engineers, an unincorporated association, et al.,
Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore

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(Argued April 15, 1955. Decided May 20, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

PARKER, Chief Judge:

This is an appeal from an order dismissing a suit for lack of jurisdiction. See *Alabaugh et al. v. B. & O. R. Co.*, 125 F. Supp. 401. Plaintiffs are six locomotive engineers employed by the Baltimore & Ohio Railroad Company. The defendants are that company and the General Grievance Committee of the Brotherhood of Locomotive Engineers. The Brotherhood had entered into a union shop agreement with the B. & O. and had complained to the B. & O. that

plaintiffs had failed to maintain union membership in accordance with the agreement. The B. & O. had notified plaintiffs that they would be dropped from service in accordance with its terms and they instituted this suit to enjoin their discharge. The court below dismissed the suit for lack of jurisdiction, because plaintiffs had not exhausted their administrative remedies before the National Railroad Adjustment Board and they have appealed from that order.

The controversy here arises out of a union shop agreement entered into between the B. & O. and the Brotherhood pursuant to the 1951 amendment of the Railway Labor Act. 45 USC 152 Eleventh. That statute authorized union shop agreements requiring union membership of all employees. The authorization was that the agreement might require employees to become members of the labor organization representing their craft or class within sixty days of the making of the contract or of their employment whichever was later, with provision that no agreement should require membership of employees who were not admitted to membership on equal terms with other members or to whom membership was denied or terminated for any reason other than nonpayment of dues. A further provision was that the requirement as to membership would be satisfied by membership in any organization "national in scope" organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in any of the railway services. As to employees not members of any labor organization at the time of the making of the agreement, they might be required to become members of the organization representing employees, with a proviso that nothing in that section of the statute or in the agreement should prevent an employee changing membership from one organization to another. The pertinent portions of the statute are set forth in the margin.*

*45 USC 152 Eleventh authorizes carriers and labor organizations duly designated to represent their employees "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and

The agreement between the B. & O. and the Brotherhood provides that, as a condition of their continued employment, employees shall become members of the Brotherhood and thereafter maintain membership therein, subject to conditions similar to those set forth in the statute. It provides machinery for enforcing its provisions, requiring the Brotherhood to initiate proceedings for failure to comply and providing that any employee charged with such failure may request a hearing from the carrier, that the carrier shall make a determination of the facts after a hearing and that appeal may be taken to the highest officer of the carrier whose determination shall be final, except in case of a dispute between the carrier and the Brotherhood, as to which provision is made for reference to arbitrators whose action shall be final.

Plaintiffs were members of the Brotherhood in good standing at the time of the agreement and remained such until August 31, 1952, when they joined the United Railroad Operating Crafts, hereafter called UROC, a rival union, thinking, so they allege, that it was a union "national in scope" within the meaning of the Act, although

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conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for * * * (a check off).

"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service * * * if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; * * *

Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided*, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services. * * *".

it was later found not to occupy that status. One of them later joined the Brotherhood of Locomotive Firemen and Enginemen, a union admittedly national in scope. In October 1952 they were cited for failure to comply with the union shop agreement. Hearings were held on the charge in November of that year and in August 1954 a decision was rendered that they be dropped from their positions. Appeals from this decision were duly taken, but without success, and decision was rendered by the proper official of the B. & O. that they be dropped from service on October 8, 1954. They alleged that on September 1 they made application for reinstatement to membership in the Brotherhood but that their application was rejected because they had previously joined the UROC and that this was discriminatory action on the part of the Brotherhood, which had a policy of reinstating members who were in arrears in the payment of dues. They instituted this action to enjoin their discharge, contending that their rights under the statute were being violated in that they had been discriminatorily denied reinstatement by the Brotherhood, that their cases had not been promptly handled as the statute requires, that they could not be discharged for failing to maintain membership in the Brotherhood but only for failing to acquire it and that the acquisition of membership in UROC was sufficient under the act, on the theory that, although UROC was not a union national in scope, this status was not required with respect to a change of membership.

We think that the suit was properly dismissed by the court below for failure of the plaintiffs to exhaust administrative remedies before the National Railroad Adjustment Board, which has been given by Congress primary original jurisdiction over controversies of this sort. The Railway Labor Act was passed to provide for the settlement of "all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions". 45 USCA 151a. By section 3 of the act, the National Railroad Adjustment Board was created and was expressly given jurisdiction over disputes involving various classes of employees in-

cluding engineers. 45 USCA 153(h). By subsection (i) of that section 45 USCA 153(i), it was provided:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The case here involves the rights of employees under a union shop agreement arrived at by collective bargaining. The interpretation of that agreement and the rights and grievances of employees thereunder are just the sort of matters that Congress intended to be handled in the first instance by the National Railroad Adjustment Board. *Order of Railway Conductors v. Pitney*, 326 U.S. 561; *Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239; *Order of Railway Conductors of America v. Southern Ry. Co.*, 339 U.S. 255; *Spires v. Southern R. Co.*, 4 Cir., 204 F. 2d 453; *Brotherhood of Locomotive Firemen and Enginemen v. Central of Georgia Ry. Co.*, 5 Cir., 199 F. 2d 384, cert. den. 345 U.S. 908; *Starke v. New York, Chicago & St. Louis R. Co.*, 7 Cir., 180 F. 2d 569, 573. And, as said in the case last cited: "Congress having specifically conferred upon the Adjustment Board the authority to hear and determine plaintiff's grievance, it is not in the absence of express language to be implied that it also intended to confer jurisdiction upon the courts. Such a holding, as a reading of the above cases abundantly discloses, would seriously impair if not destroy the usefulness of the Act and the purposes which Congress sought to achieve."

In *Slocum v. Delaware L. & W. R. Co.*, supra, 339 U.S. 239, 242-244, the Supreme Court, in holding the jurisdiction of the Board to be exclusive in cases involving grievances and disputes arising out of agreements between carriers and their employees, used the following language:

> "The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' 48 Stat. 1186 (sec. 2), 45 USCA sec. 151a, 45 USCA sec. 151a. This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements.
>
> * * * * * *
>
> "In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the 1926 Act provided for creation of various Adjustment Boards by voluntary agreements between carriers and workers. 44 Stat. 578. But this voluntary machinery proved unsatisfactory, and in 1934 Congress, with the support of both unions and railroads, passed an amendment which directly created a national Adjustment Board composed of representatives of railroads and unions. 48 Stat. 1189-1193. The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of

agreements throughout the nation's railway systems. * * * We hold that the jurisdicition of the Board to adjust grievances and disputes of the type here involved is exclusive."

This is one of a number of cases in which controversies have arisen under union shop agreements because of the joining of UROC by members of the Brotherhood; and it has been repeatedly held in these cases that there is no jurisdiction in the courts over controversies of this character in the absence of exhaustion of remedies before the Board. In the Second Circuit, engineers, who had joined the UROC and were threatened with discharge under a similar union shop agreement, brought suit to enjoin their discharged alleging, as do plaintiffs here, that such discharge would be in violation of provisions of the Railway Labor Act. Judge Conger dismissed the suit on the ground that the Board had exclusive jurisdiction, filing an able and comprehensive opinion, which was adopted by the Court of Appeals of the Second Circuit in affirming his order of dismissal. *United Railroad Operating Crafts v. Wyer*, 115 F. Supp. 359, aff. 2 Cir., 205 F. 2d 153, cert. den. 347 U.S. 929. In the Seventh Circuit, suit was brought by an engineer who had joined the UROC and was threatened with discharge. He asked an injunction and alleged "eight to ten respects in which the discharge order, and the interpretation of the union shop agreement implicit therein" were said to deprive him of his rights under the Railway Labor Act. A three judge court was convened because the constitutionality of the Union Shop Amendment was also challenged in the suit. The three judge court was dissolved on the ground of exclusive jurisdiction in the Board and an opinion was filed for the court by Judge Lindley which answers practically every argument made before us. Upon appeal the action of the three judge court was affirmed in a per curiam order by the Supreme Court. *Johns v. Baltimore & O. R. Co.*, 118 F. Supp. 317, aff. 347 U.S. 964. Judge La Buy, one of the members of the panel of three judges, dismissed the case when it was returned to him upon the dissolution of the three judge court. Similar injunction suits by engineers who had joined UROC were

dismissed on the ground of failure to exhaust the remedy before the Board by the Court of Appeals of the Ninth and Seventh Circuits in *United Railroad Operating Crafts v. Northern Pac. Ry. Co.*, 9 Cir., 208 F. 2d 135, cert. den. 347 U.S. 929, and *United Railroad Operating Crafts v. Penn R. Co.*, 7 Cir., 212 F. 2d 938. In the Sixth Circuit a similar suit was dismissed on the same ground in the Eastern District of Michigan by Judge Levin in *Pigott v. Detroit, T. & I. R. Co.*, 116 F. Supp. 949, cert. den. 347 U.S. 944.

None of the grounds upon which it is sought to distinguish these cases has any merit. It is argued on the authority of our decision in *Atlantic Coast Line R.R. v. Pope*, 119 F. 2d 39, that the Board has no jurisdiction because of the provisions for appeal and arbitration in the union shop agreement; but it is perfectly clear that the provision for the procedure prescribed by the agreement is in no sense the creation of a System Board of Adjustment such as we dealt with in the Pope case; and in none of the cases cited, in which the same union shop agreement was involved, does it seem to have been thought that the jurisdiction of the Board was in anywise affected by the provision. Furthermore, the provision of the agreement referred to relates to disputes between the Brotherhood and the carrier and not to grievances of the employees against the carrier.

The contention that the court should take jurisdiction, notwithstanding the jurisdiction in the Board, because rights are claimed under a statute does not seem to have impressed the three judge court in *Johns v. B. & O. R. Co.*, supra, 118 F. Supp. 317, nor the Supreme Court, which affirmed its decision, 347 U.S. 964. It does not impress us. There is no reason why the Board should not consider all rights, statutory and constitutional as well as others, in making its determination. See *United R.R. Operating Crafts v. Northern Pacific R. Co.*, supra, 9 Cir., 208 F. 2d 135, 138. After such determination is made, plaintiffs, if they feel that any such rights have been denied them, may seek redress in the courts, having then exhausted their administrative remedies; but it would breed endless confusion and virtually nullify the administrative remedy

which Congress has been at pains to provide, to allow the Board to be by-passed by an allegation that rights under a statute are involved. As to the contentions that under the statute an employee is required to acquire membership but not to maintain it and that a union of "national scope" is required with respect to acquiring but not with respect to transferring membership, these seem to be frivolous, but there is no reason why the Board should not consider these contentions as well as other matters in making its determination.

Plaintiffs rely upon *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, and *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768; but those cases dealt with racial discrimination, as to which the courts were well qualified to grant relief and which involved none of the matters of collective bargaining which the Adjustment Board was set up to handle. The distinction between the racial discrimination dealt with in these cases and the sort of discrimination charged here was adverted to in the Steele case in the following language where, after stating that it was the duty of the bargaining representative to exercise fairly the power conferred upon it, the court said (323 U.S. 192, 203):

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit."

In *Spires v. Southern Ry. Co., supra*, 204 F. 2d 453, we had before us a case in which it was alleged that plaintiffs had been discriminated against by the union acting as their

bargaining agent which, it was alleged had acted "deliberately and maliciously * * * for the benefit of its members and to the detriment of plaintiffs'. There, as here, the Steele and Howard cases were relied on as a basis for the court's granting equitable relief; but we affirmed the action of the District Court in dismissing the case on the ground that administrative remedies before the Board had not been exhausted. Logically it may seem that if a court has jurisdiction to protect rights against racial discrimination it should have jurisdiction to protect them against discrimination on account of union membership; but the answer is that the Adjustment Board was not set up to deal with racial controversies, but controversies arising out of labor relationships.

The argument that the Adjustment Board might not furnish a fair tribunal in cases of this character because certain members might be biased and prejudiced because of union affiliations furnishes no reason why the courts may ignore the fact that Congress has vested it with exclusive primary jurisdiction in such cases. *United R. R. Operating Crafts v. Penn. R. Co.* supra, 7 Cir. 212 F. 2d 938, 942-943. As said by Judge Conger in his opinion in the *United Railroad Operating Crafts v. Wyer,* supra, 115 F. Supp. 359, 365: "In view of the fact that I believe the Adjustment Board has jurisdiction, which the Supreme Court has said is exclusive, I am not certain whether there is room for concern over how plaintiffs will fare before the Board. And it is a fantastic thought that every employee who is discharged under a union shop agreement can run to Court about it."

The argument that the court has jurisdiction under the principles laid down in *Texas & N. O. R. Co. v. Brotherhood* 281 U. S. 548 and *Virginian Railway Co. v. System Federation No. 40* 300 U. S. 515 is without force. Those cases held merely that the courts will use their equitable powers to enforce orders of the Board. There is no intimation that they should exercise such powers in the first instance over matters of which the Board has been given exclusive primary jurisdiction.

For the reasons stated, we think that the court below properly dismissed the action because of failure of plaintiffs to exhaust their administrative remedies before the Board, and the order appealed from will accordingly be affirmed.

Affirmed.

APPENDIX C

Decision on Final Administrative Appeal

Decision on appeal had pursuant to the provisions of paragraph 5(c) of Agreement effective November 1, 1951, between the Baltimore and Ohio Railroad Company and certain employees represented by the Brotherhood of Locomotive Engineers, in the case of John R. Alabaugh

Appeal hearing in the above entitled matter was held in Baltimore, Maryland, on September 1, 1954, at which hearing the record indicates all parties involved were either present in person or duly represented.

The record discloses that Mr. John R. Alabaugh appealed, pursuant to the provisions of Section 5 of Union Shop Agreement effective November 1, 1951, Manager Labor Relations R. L. Harvey's decision dated August 11, 1954 dropping him from service because of failure to comply with the terms of such Union Shop Agreement.

The decision on appeal is that John R. Alabaugh failed to comply with the provisions of the aforesaid Agreement effective November 1, 1951, in that at the time of the hearing on November 18, 1952, he did not hold nor had not acquired membership in the Brotherhood of Locomotive Engineers, nor in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service.

The decision, therefore, is that pursuant to the terms of said Agreement effective November 1, 1951, the employment relationship of John H. Alabaugh with the Baltimore and Ohio Railroad Company is terminated effective October 8, 1954, and his service record will be marked:

"October 8, 1954 — Dropped account failure to comply with the terms of the Union Shop Agreement, effec-

tive November 1, 1951, between The Baltimore and Ohio Railroad Company and the Brotherhood of Locomotive Engineers."

W. A. HARRIS,

Assistant Manager Labor Relations.

Dated — Baltimore, Maryland

October 1, 1954

APPENDIX D

(JUDGMENT OF THE UNITED STATES COUNT OF APPEALS FOURTH CIRCUIT)

J. R. Alabaugh, W. H. Schaver, J. W. Welman, C. J. Schwenninger, C. H. Smith and C. B. Fledderman,

Appellants,

vs.

The Baltimore and Ohio Railroad Company, a body corporate

and

Brotherhood of Locomotive Engineers, an unincorporated association

and

General Grievance Committee of the Brotherhood of Locomotive Engineers on the Baltimore and Ohio Railroad, an unincorporated association,

Appellees.

No. 6955

Appeal from the United States District Court for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the said District

Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Chief Judge, Fourth Circuit.

MORRIS A. SOPER,
United States Circuit Judge.

ARMISTEAD M. DOBIE,
United States Circuit Judge.

Filed May 20, 1955

R. M. F. WILLIAMS, JR.,
Clerk.

Office - Supreme Court, U. S.
FILED
AUG 15 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 240

J. R. ALABAUGH, W. H. SCHAVER, J. W. WELMAN, C. J. SCHWENNINGER, C. H. SMITH, AND C. B. FLEDDERMAN,

Petitioners,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A BODY CORPORATE, AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, AND GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE BALTIMORE AND OHIO RAILROAD, AN UNINCORPORATED ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE BALTIMORE AND OHIO RAILROAD

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Dated: August 15, 1955

The Daily Record Co., Baltimore 3, Md.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 240

J. R. ALABAUGH, W. H. SCHAVER, J. W. WELMAN, C. J. SCHWENNINGER, C. H. SMITH, AND C. B. FLEDDERMAN,

Petitioners,

VS.

THE BALTIMORE AND OHIO RAILROAD COMPANY, A BODY CORPORATE, AND BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, AND GENERAL GRIEVANCE COMMITTEE OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE BALTIMORE AND OHIO RAILROAD, AN UNINCORPORATED ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE GENERAL COMMITTEE OF ADJUSTMENT OF THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS ON THE BALTIMORE AND OHIO RAILROAD

The petitioners seek the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on May 20, 1955 (R. 95) which affirmed the judgment of the United States

District Court for the District of Maryland entered on November 5, 1954, granting the motion of the defendant, General Committee of Adjustment of The Brotherhood of Locomotive Engineers on the Baltimore and Ohio Railroad[1] ("Committee"), to dismiss the complaint (R. 29) dismissing the complaint, and vacating a temporary restraining order (R. 49).

Upon request of the plaintiffs, the District Court extended the restraining order until the appeal had been heard and determined by the Court of Appeals, and the latter court ordered that the mandate be stayed pending the application of the appellants in this Court for a Writ of Certiorari (R. 95).

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 83; Petition 35) is reported in 222 F. 2d 861. The opinion of the District Court for the District of Maryland (R. 34) is reported in 125 F. Supp. 401.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming dismissal for want of jurisdiction in employees' suit for injunction to restrain their discharge by carrier for noncompliance with a valid union shop agreement (made in

[1] The defendant Committee was incorrectly named in the caption as General Grievance Committee of The Brotherhood of Locomotive Engineers on the Baltimore and Ohio Railroad. The correction was brought to the attention of the trial court prior to filing the motion to dismiss, but the caption was not amended.

conformity with Section 2 Eleventh of Railway Labor Act), where employees failed to submit dispute to National Railroad Adjustment Board which, by Section 3(i) of Railway Labor Act, is given jurisdiction in such matters.

2. Where employees violate requirements of union membership under union shop agreement, by resigning from representative union to join another and non-qualified union, does the charge of subsequent discrimination against representative union in refusing reinstatement because of membership and activity in such other union, confer jurisdiction on Courts in injunction suits to restrain discharge for such violation, where jurisdiction in such matters has been conferred by Congress upon the National Railroad Adjustment Board.

STATUTES INVOLVED

The pertinent provisions of the Railroad Labor Act, 45 U.S.C., Sections 151(a), 152 Fourth, Fifth, Eleventh, and, 153, are printed in the Appendix hereto, pp. 25-36.

STATEMENT

The Nature of the Action

Petitioners' action is for a permanent injunction restraining the defendant The Baltimore and Ohio Railroad Company ("Company") from discharging them, as the Complaint states, "*by reason of the claimed non-compliance of plaintiffs with the provisions of the Union Shop Agreement*" between the Company and the defendant Brotherhood of Locomotive Engineers ("Brotherhood"), and restraining the Brotherhood and Committee from attempting to induce such discharges by reason of such claimed non-compliance. Corresponding interlocutory relief is sought (Complaint, R. 9).

As the District Court observed, prevention of discharge is the real relief sought (Opinion, R. 47).

Petitioners are employed by the Company as locomotive engineers on its railroad lines (Complaint, R. 2). Their employment rights here involved are governed in general by a collective agreement and in particular by the union shop agreement (Ex. A to Complaint, R. 13-20).

The union shop agreement provides that the Company shall decide questions of an employee's non-compliance with the agreement, and render decision accordingly (Sec. 5(b), (c), R. 16-17). The Company, after notice of non-compliance, citation, hearing and appeal, found non-compliance, and, accordingly, made the challenged decisions to discharge petitioners therefor, effective October 8, 1954 (R. 26).[1]

It is, of course, the carrying into effect of these decisions, which petitioners seek to have enjoined. Indeed, in the posture in which the dispute stood at the time of the filing

---

[1] The decision in Alabaugh's case, which was duplicated in the cases of the other petitioners, reads (R. 26-27):

> "The decision on appeal is that John R. Alabaugh failed to comply with the provisions of the aforesaid Agreement effective November 1, 1951, in that at the time of the hearing on November 18, 1952, he did not hold nor had not acquired membership in the Brotherhood of Locomotive Engineers, nor in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service.
>
> The decision, therefore, is that pursuant to the terms of said Agreement effective November 1, 1951, the employment relationship of John H. Alabaugh with the Baltimore and Ohio Railroad Company is terminated effective October 8, 1954, and his service record will be marked:
>
> > "October 8, 1954 — Dropped account failure to comply with the terms of the Union Shop Agreement, effective November 1, 1951, between The Baltimore and Ohio Railroad Company and the Brotherhood of Locomotive Engineers."

of the complaint, it seems clear that the Brotherhood defendants, although proper parties because of their interest in the issues, were not indispensable parties to the action. As both the decision and the power to discharge were solely for the Company, the dispute presented in this action must be between petitioners and the Company.

In disputing the Company's decision, petitioners alleged as defenses that the Brotherhood was guilty of discrimination to the knowledge of the railroad at the time of the appeals when, *after petitioners had voluntarily terminated their membership in the Brotherhood* (and had thereby violated the required maintenance of membership) and had received notice of the Company's decision that they were in non-compliance, it refused to reinstate them, thereby denying membership on the same terms as were available to other members (Complaint, pars. 6, 10, 15-17); and that the respondents violated the agreement in delaying the decisions for an unreasonable time (Complaint, pars. 8-14, 18). All of these allegations are matters relating to petitioners' compliance or non-compliance with the provisions of the union shop agreement.[1] They there-

[1] At page 29 of the Petition, counsel suggest that the transfer proviso in Section 152 Eleventh (c) omits the requirement that the organization to which the employee may transfer must be "national in scope", so that an employee should not be discharged for changing to a new organization which is not "national in scope".

No question is fairly raised among the Questions Presented that the petitioners were immunized by transfer to UROC within the meaning of the aforegoing clause, nor is such claim made in the Complaint. Similarly, no claim is presented in the aforementioned questions that Petitioner Schaver had complied with the agreement by reason of the allegation that after default, he had transferred to the Brotherhood of Locomotive Firemen and Enginemen (Complaint, par. 7 (R. 5)), and, this question is thus waived here.

The District Court held that maintenance of membership in the contracting organization was implied (R. 40-41), and the Court of Appeals held that the argument made below on the point was frivolous (R. 92).

fore present a dispute concerning the interpretation or application of the agreement, or grievances against the Company concerning its orders of discharge.

Petitioners have incorporated in the complaint various statements that the appellees have violated the union shop amendment of the Railway Labor Act. Since the amendment deals only with the statutory *authorization* to make such agreement, it would seem that petitioners' substantive rights rest upon the agreement and not the statute. And where, as here, the agreement follows the statute, no violation of the latter apart from the former is possible.

In any event, the Court of Appeals considered petitioners' claims of violation of the statute and found no reason why the Adjustment Board should not consider all rights, statutory and constitutional, as well as others, in making its determination under the available administrative remedy (R. 46).

The facts and petitioners' contentions are stated in the Opinions of the Court of Appeals (R. 84-88) and the District Court (R. 34-35, et seq.).

However petitioners' statement of the Questions Presented and Statement of the Case require brief comment. In the first of the Questions Presented, the statement ignores the facts that here the contract upon which petitioners' substantive rights depend protects them from any illegal discrimination by the bargaining agent, and consequently, that the remedy for any such discrimination which violates that contract, is resort to the Adjustment Board.

The second of the Questions proceeds upon the mistaken premise that there is no dispute as to the facts and particularly no dispute as to the interpretation of the union shop agreement. Although the facts are admitted for the purpose of ascertaining whether the court has jurisdiction over

the subject matter, this does not mean that such facts were undisputed or were so found by the carrier in the hearings before it. It is our view, therefore, that while the admitted facts describe the claims of petitioners under which the court's jurisdiction is put in issue, the controversy will be decided on the merits by the Adjustment Board upon the fact record developed at the hearings including any such disputed matters. Moreover, as discussed at pp. 13-16, *infra*, there is a dispute here as to the interpretation and application of the agreement.

The third Question lacks reference to the fact that the provision in the union shop agreement that a decision on appeal rendered against petitioners which is termed "final and binding" by the agreement is, like other terms here involved, subject to interpretation and application. It is the interpretation of the signatory Committee that the quoted language was not and is not intended to do more than terminate the proceedings "on the property". Neither the Committee nor the Board has ever interpreted the provision as divesting the Adjustment Board of jurisdiction over the claim of a discharged employee. The Company evidently now agrees to that interpretation, for it has itself recently submitted to the Board a case involving three discharges under the instant union shop agreement, seeking an award that the discharge was proper. The Board docketed the case and took jurisdiction.[1]

Petitioners' Statement of the Case virtually ignores the fact that at the time petitioners were cited for non-compliance on October 29, 1952, they had been in default of membership in the Brotherhood since on or about August 31, 1952 (R. 4-5), so that the maintenance of membership

[1] *Baltimore and Ohio R. Co. v. Burton C. Johns, Herbert V. Thompson and Virgil G. Hughes* (First Division, Docket 33149). The latter two respondents were parties to the proceedings before the Company involved in the instant case.

requirement was clearly breached. Petitioners do not claim that membership in the Brotherhood was not then available or that there was any valid excuse for such failure to maintain such membership. It was not until after the carrier had notified petitioners by letter of August 11, 1954, that they were to be dropped for non-compliance (R. 5) that petitioners, having lost on the merits, made application for reinstatement in the Brotherhood. Such applications were made by letter of August 23, 1954, and orally at the appeal hearings on September 1, 1954 (R. 6-7).

As the trial Court found (Opinion R. 42):

> "Plaintiffs voluntarily stopped paying dues to Brotherhood and terminated their membership therein, in order to join and be active in a rival union. Plaintiffs gambled heavily for a stake which must have seemed worth the risk to them at that time. By terminating their membership in Brotherhood and ceasing to pay dues to it, they made themselves subject to discharge by B & O under the terms of the union shop agreement, unless they could show that UROC was a labor organization which qualified under section 152 Eleventh (c). They could have hedged their bet by continuing to pay dues to Brotherhood after joining UROC, pending determination of UROC's status. If they had continued to pay dues to Brotherhood, that union might have expelled them for dual unionism,[1] but B & O could not have discharged them, in view of the provisions of section 152 Eleventh (c). They would have continued in their employment as 'free riders'. But they chose to stake all on UROC. Having lost, they sought reinstatement in Brotherhood.
>
> When plaintiffs applied for reinstatement in Brotherhood, it was within the discretion of that organization whether or not they should be reinstated. There is no provision in the statute or in the agreement with B & O which requires such action."

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[1] At the hearings before the Company, it was developed that the Brotherhood permitted such dual membership. (Footnote ours.)

The question is thus presented as to whether the proper interpretation and application of the agreement requires the Company to set aside its prior decision of non-compliance in the event the defaulting employee later seeks restoration to union membership on a leniency basis and claims discrimination by the Brotherhood in the extension of leniency. The facts and circumstances of the alleged discrimination (which was denied by the Brotherhood) were thoroughly explored in the hearings before the Company and will be available to the Board.

This case is companion to a series of other cases by UROC or members thereof against the employing carriers to restrain discharge pursuant to the union shop agreements. In these cases, as in the instant case, the individuals transferred to UROC and thereupon terminated their membership in the contracting brotherhoods. The defaulting employees, as in our case, relied upon the mistaken claim that UROC was national in scope and hence qualified as a substitute for the required membership in the contracting organization.[1]

No claim is made in the Complaint in the instant case that UROC is national in scope. The contention that alleged discrimination in such leniency reinstatements obviates compliance with the maintenance of membership requirements of the agreement, is only a variant in detail, but not in principle, of the claims made in the other UROC cases, that the employees had complied with the agreement.

Prior to the filing of the instant case, the Courts, in unbroken sequence, had determined that under the Railway Labor Act, jurisdiction to review disputes over the validity

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[1] A special proviso of Subdivision (c) of Section 152, Eleventh allowed operating employees the alternative of membership in a national in scope union instead of the contracting union.

of discharges ordered for breach of union shop agreements resides, at least in the first instance, in the National Railroad Adjustment Board or a System Board in lieu thereof.[1]

There is no need for further review in the instant case.

ARGUMENT

Reasons for Denial of the Writ

1. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Court of Appeals held that the suit was properly dismissed by the court below for failure of the plaintiffs to exhaust administrative remedies before the National Railroad Adjustment Board, which has been given by Congress primary original jurisdiction over controversies of the sort here presented. In so holding it pointed to the expressed purpose of the Railway Labor Act to provide for the settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions (45 USC 151(a)), and to the jurisdiction given to the National Railroad Adjustment Board to settle such disputes arising between an employee and his carrier (45 USC 153) (Opinion R. 87).

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[1] UROC, et al. v. Wyer, et al., 205 F. 2d 153 (2nd Cir.), cert. den. 347 U.S. 929; UROC, et al. v. New, York, N.H. & H.R. Co., et al., 205 F. 2d 153 (2nd Cir.) cert. den. 347 U.S. 929; UROC, et al. v. Pennsylvania R. Co., 212 F. 2d 938 (7th Cir.), cert. den. (before judgment) 347 U.S. 929; UROC, et al. v. Northern Pac. R. Co., et al., 208 F. 2d 135 (9th Cir.), cert. den. 347 U.S. 929; Lake, et al. v. B. & O. R. Co., 31 L.R.R.M. 2565 (U.S.D.C., S.D.W. Div. Ohio), appeal dismissed by stip.; Bohnen v. B. & O. C. T. R. Co. (U.S.D.C. N.D. Ill.) unreported, but see 125 F. Supp. at 464; Bohnen, et al. v. B. & O. C. T. R. Co., et al., 125 F. Supp. 463 (D.C., N.D. Ind.); Johns v. B. & O. R. Co., 118 F. Supp. 317 (D.C. Ill.) aff'd. 347 U.S. 964; Johns v. B. & O. R. Co. (D.C., N.D. Ill.) 24 Labor Cases No. 68,100, p. 85,284, note (dismissed); and Pigott, et al. v. D. T. & I. R. Co., et al. (6th Cir.) 221 F. 2d 736.

In construing the Act, this Court, in a series of cases, has held that Congress, by the Railway Labor Act, intended to and did deprive courts of jurisdiction over all disputes for the settlement of which it has provided administrative tribunals, one of which is the National Railroad Adjustment Board. *General Committee, B. L. E. v. Missouri K. T. RR.*, 320 U.S. 323, 327-328, 331-337; *General Committee, B. L. E. v. Southern Pacific Co.*, 320 U.S. 338, 344; *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 302; *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567-568; *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 244; *Order of Railway Conductors v. Southern Railway Co.*, 339 U.S. 255, 256.

Both the Court of Appeals and the trial Court in the instant case recognized and applied this principle. Numerous other federal courts have applied it, not only in the UROC cases previously cited, but in other disputes cognizable by the Board,[1] so that the federal law on the subject appears to be thoroughly settled.

a. *The National Railroad Adjustment Board is vested with, and uniformly exercises, jurisdiction to redress alleged discriminatory discharges.*

Where illegal discrimination concerning union membership or non-membership is alleged as the basis of discharge, the Board has for many years exercised jurisdiction and determined the validity of the discharges. Prior to

[1] *Hayes v. Union Pacific Railway Co.*, 184 F. 2d 337, 338 (C.A. 9), cert. den. 340 U.S. 942; *Broady v. Illinois Central R.R. Co.*, 191 F. 2d 73, 77-78 (C.A. 7, 1951), cert. den. 342 U.S. 897; *Starke v. N.Y.C. & St. L. R. Co.*, 180 F. 2d 569, 573-574 (C.A. 7, 1950); *Hampton v. Thompson*, 171 F. 2d 535, 538-539 (C.A. 5, 1949); *Butler v. Thompson*, 192 F. 2d 831, 833 (C.A. 8, 1951); *Brotherhood of Locomotive Firemen and Enginemen v. Central of Georgia Ry. Co.*, 199 F. 2d 384, 385 (C.A. 5, 1952), cert. den. 345 U.S. 908; *Spires et al. v. Southern Ry. Co.*, 204 F. 2d 453, 457 (C.A. 4, 1953).

1951, there was an absolute prohibition of discharges because of membership or non-membership in a union (45 U.S.C. 152, Fourth and Fifth). This prohibition was relaxed by the 1951 amendment (45 U.S.C. 152 Eleventh), which authorizes the making of union shop agreements. Under Section 152, Fourth and Fifth, the Board had repeatedly heard and decided cases of this character. For example, in 1936, thirty-one such cases were decided by the Second Division of the Board, which found discrimination in seventeen of the cases.[1] In 1940, the Fourth Division decided seven such cases, finding discrimination in each of them.[2]

Where the discharge in such cases is found to be in violation of Section 152 Fourth or Fifth, the Board enters an order to that effect and usually orders reinstatement with back pay. Such an order has been held enforceable in the United States District Court. See *Odom v. Thompson*, 85 F. Supp. 477, 480-2 (N.D. Ala. S.D. 1949).[3]

Before passing from the Section 152, Fourth and Fifth cases, it is appropriate to notice, although the Court of Appeals did not find it necessary to pass upon the point, that if and to the extent that a discharge is ordered for lack of union membership which is not protected by a valid union shop agreement (which we deny is the case here), it remains violative of Section 152 Fourth and the statutory contract of employment resulting therefrom. In such case the Board has jurisdiction to grant relief.

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[1] Cases in which discharge held unjust: Awards Nos. 44-46, 96-98, 102-106, 109, 113, 114, 116, 119, 122.

Cases in which discharge held just: Awards Nos. 47, 99, 101, 107, 108, 110-112, 115, 117, 118, 120, 121, 123,

[2] Awards Nos. 57 through 63.

[3] There the Court, although holding that the case presented a "grievance", referred to the fact (p. 481) that Section 152 (Eighth) expressly makes Section 152 Fourth a part of the contract of employment. Thus the claimant, as in our cases, had the right to redress by the Board for a proved violation of his contract of employment.

In another category, there are numerous awards of the Board reinstating with pay employees who had been dismissed from service upon the charge, analogous to that in our case, that they had violated carrier rules. The record contains illustrations of such or similar affirmative awards made to individuals who prosecuted their cases without representation by any of the Brotherhoods. See First Division Awards 16426 — Edward Niedzweiki, and 15888 — Theodore J. Darby; Second Division Awards 1821 — Sylvester Shaw, and 1833 Mrs. Catherine F. Dooley, printed in the Appendix to our brief below (R. 65-80).

Petitioners assert (Petition, p. 14, note 3) that the Committee on brief below did not cite a single case in which an individual's complaint was entertained when opposed by his bargaining agent. Board awards in the cases of individual petitioners do not, as a rule, disclose the position of the bargaining agent. If petitioners' assumptions of antagonism of the bargaining agent to individuals not represented by the agent held true, it would be inferred that the union opposed the restoration to service in the aforementioned cases. Nevertheless, the Board allowed the claims.

Moreover, the docketing of *B. & O. R. Co. v. Johns, Thompson and Hughes, supra*, p. 7 points up the acceptance of jurisdiction by the First Division to decide the dispute in the case at bar, for the B & O's submission sets forth claims by the respondents Thompson and Hughes of alleged discrimination by the Brotherhood in making membership unavailable to them after default, citation and initial hearing.

b. *The instant case involves the interpretation or application of the union shop agreement.*

The Court of Appeals had no difficulty in concluding that the interpretation and application of the union shop agree-

ment are involved here, saying that the interpretation of that agreement and the rights and grievances of the employees thereunder are "just the sort of matters" that Congress intended to be handled in the first instance by the Board, citing, among others, the *Pitney*, *Slocum* and *Railway Conductors* cases (R. 88).

The Court further adverted to the reference of Judge Lindley in the *Johns* case (118 F. Supp. at 317) to the fact that Johns alleged "eight to ten respects in which the discharge order, and the interpretation of the union shop agreement implicit therein" were said to deprive him of his rights under the Act (R. 90).[1]

And in a case remarkably similar to ours, *Bohnen v. B. & O. C.T.R. Co.*, *supra*, the District Court in dismissing for want of jurisdiction found that the case involved a dispute growing out of an interpretation or application of the union shop agreement which must be brought before the Adjustment Board (125 F. Supp. at 465), where the

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[1] For example, the Complaint in the *Johns* case alleged in par. 21 thereof: "In or about August, 1950, plaintiff attempted to take out membership in the Brotherhood of Locomotive Engineers but was informed at that time by an official of said Brotherhood that for a reason other than failure to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in said Brotherhood, he would not be admitted to membership. Accordingly, plaintiff is protected by Section 2, Eleventh (a) of the Railway Labor Act from discharge under the aforesaid union shop agreement."

The other allegations referred to by Judge Lindley were brought to the attention of this Court in the Brotherhood's motion to dismiss (p. 3) filed in No. 625, October term, 1953, in the appeal of the decision of the three-judge court. These allegations, however, were not passed upon in the consideration of the constitutional questions involved in the appeal. They are referred to here in connection with the views of experienced judges upon the involvement of the interpretation or application of the agreement in the issue of the alleged wrongful discharge.

With these allegations before him, Judge La Buy later dismissed this complaint for want of jurisdiction. *Johns v. B. & O. R. Co.*, 24 Labor Cases No. 68,100, p. 85284, note at end of opinion.

gravamen of the plaintiff's complaint was that the Brotherhood of Railroad Trainmen refused reinstatement only to those members of UROC who were active in that organization and that the Brotherhood offered and did accept back those members of UROC who were not active in that organization (p. 464).

There are numerous questions presented in the instant case involving the interpretation and application of the agreement. Some are found in the maintenance of membership provisions.[1] Others include the questions raised by petitioners (pp. 3, 5-6) of *when* the unavailability of union membership will prevent discharge. Is it at the time of citation and hearing at which admitted non-compliance was established? Or, is it at the time of discharge following appeal? This requires interpretation of Section 5 of the agreement (R. 15-17), and, particularly, the meaning and effect of the stay provisions incident to the appeal. They embrace questions (Petition, p. 23) of the meaning and effect of the provisions making the Company's decision "final and binding";[2] whether the provisions in Section 5

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[1] In respect of the provisions for maintenance of membership and excuse therefrom (Secs. 1, 2, 4): Does the agreement (Secs. 1, 5) and the practice thereunder provide for any suspension of membership requirements after non-compliance or afford retrospective operation to any subsequent refusal of membership? Does the agreement (Secs. 1, 5) excuse maintenance of membership on the ground of unavailability when membership was not shown to be unavailable at the time of non-compliance? Does it require leniency reinstatement to membership after non-compliance, hearing and notice of adverse initial decision? Was the refusal of the Brotherhood to reinstate an unreasonable or discriminatory refusal of leniency under the circumstances? Did petitioners' mistaken belief that UROC was national in scope require leniency reinstatement?

[2] District Judge Thomsen held (R. 45):

"The Union Shop Amendment of 1951, 45 U.S.C.A. §152 Eleventh, repealed only so much of section 152 Fourth and Fifth as are inconsistent with it. Unless the discharge was proper under the authority of section 152 Eleventh, the provisions of the union shop agreement could not destroy plaintiffs' rights under section 152 Fourth and Fifth, and the provisions of sec. 5(e) of

were intended to be subordinated to those of Section 8 in case of employee appeals; whether Section 8 creates a "System Board of Adjustment"[1] within the meaning of Section 2 Second of the Act and hence ousts the National Board of jurisdiction; and, whether the rules relating to the handling of grievances are to be interpreted as preventing resort to the Board (See opinion of District Court, R. 45). The Court of Appeals found that these matters were for the Board to decide (R. 88, 89, 91, 92).

c. *The remedy of resort to the Adjustment Board is available to Petitioners.*

This Court, in affirming *Johns v. Baltimore & O. R. Co.*, 347 U.S. 964, and in denying certiorari in other UROC union shop cases,[2] has been confronted with objections, here reiterated, to the remedy of resort to the Board. It found no constitutional infirmity in Section 2, Eleventh, in the *Johns* case — and none is claimed here — and declined to disturb the judgments below in each of the others. In

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the union shop agreement, quoted above, should not be construed as attempting to do so. The exclusive remedy for violation of rights under section 152 Fourth and Fifth is a proceeding before the Adjustment Board under section 153 First (i)."

[1] Circuit Judge Parker held (Petitioners' App. 42):

"* * * But it is perfectly clear that the provisions for the procedure prescribed by the agreement is in no sense the creation of a System Board of Adjustment such as we dealt with in the Pope case; and in none of the cases cited, in which the same union shop agreement was involved, does it seem to have been thought that the jurisdiction of the Board was in anywise affected by the provision. Furthermore, the provision of the agreement referred to relates to disputes between the Brotherhood and the carrier and not to grievances of the employees against the carrier."

[2] UROC v. Wyer, No. 472, October Term, 1953, cert. den. 347 U.S. 929; UROC v. N.Y.N.H. & H. R. Co., No. 472, October Term, 1953, cert. den. 347 U.S. 929; UROC v. Nor. Pac. R. Co., No. 513, October Term, 1953, cert. den. 347 U.S. 929; UROC v. Pennsylvania R. Co., No. 548, October Term, 1953, cert. den. (before judgment) 347 U.S. 929; Pigott et al. v. D. T. & I. R. Co., No. 607, October Term, 1953, cert. den. (before judgment) 347 U.S. 944.

the course of this UROC litigation, six District Courts in nine cases,[1] and five Courts of Appeal[2] have either expressly or by necessary implication held that remedy is available.

In other cases brought by minority unions or individuals, which were dismissed below for want of jurisdiction, this Court has similarly declined to review,[3] notwithstanding the claim of the plaintiff in some of them that the Board would be "stacked" against him.

Experienced judges have stated that they will not impugn the integrity of the Board, and will not assume unfair or inadequate consideration by the Board, particularly in view of the expressed intent of Congress to have these controversies settled by the Board. As said by Judge Lindley in the *Johns* case (118 F. Supp. at 322):

> "* * * a different decision would require the court to impugn, as plaintiff seems to do, the integrity of the Adjustment Board, by presuming that it will act other than fairly and within its statutory and constitutional standards of procedure."

See also expression of Judge Conger in *UROC v. Wyer*, 115 F. Supp. at 365, affirmed on his opinion, 205 F. 2nd 153, and cited with approval in the instant case (R. 94).

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[1] UROC v. Wyer, 115 F. Supp. 359; UROC v. N.Y.N.H. & H. R. Co., 115 F. Supp. 359; UROC v. Nor. Pac. R. Co. (U.S.D.C., W.D. Wash. N.D.) unreported; Lake v. B. & O. R. Co., 31 L.R.R.M. 2565; Johns v. B. & O. R. Co., 24 Labor Cases No. 68100, p. 85284, note; Bohnen v. B. & O. C.T.R. Co. (U.S.D.C., N.D. Ill.) unreported *supra;* Bohnen v. B. & O. C.T.R. Co. (U.S.D.C., N.D. Ind.) 125 F. Supp. 463; Pigott v. D. T. & I. R. Co., 116 F. Supp. 949; Alabaugh v. B. & O. R. Co., 125 F. Supp. 401.

[2] UROC v. Wyer, 205 F. 2d 153; UROC v. N.Y.N.H. & H. R. Co., 205 F. 2d 153; UROC v. Nor. Pac. R. Co., 208 F. 2d 135; UROC v. Penna. R. Co., 212 F. 2d 938; Pigott v. D. T. & I. R. Co., 221 F. 2d 736; Alabaugh v. B. & O. R. Co., 222 F. 2d 861.

[3] BLF&E v. Central of Ga. R. Co., 199 F. 2d 384, cert. den. 345 U.S. 908; MKT R. Co. v. Randolph, 164 F. 2d 4, cert. den. 334 U.S. 818; Hayes v. Union Pac. R. Co., 184 F. 2d 337, cert. den. 340 U.S. 942. Cf. Hampton v. Thompson, 171 F. 2d 535; Spires v. Southern Ry. Co., 204 F. 2d 453.

Petitioners rely upon certain "factors" which they find in statements of this Court in the *Steele* case (Petition, pp. 13-15) as the basis for the contention that the court has jurisdiction here. In the *Steele* case this court stated (323 U.S. at 205-207) (1) that even though the dispute between the railroad and Steele could be heard by the Board, the Board could not grant the entire relief sought (which included damages against the union); (2) that the Board had declined to intervene in over 400 cases of individual grievance claims; and (3) that it could not say there was an effective remedy available to the negro employees who were neither eligible for membership in the union nor able to secure separate representation.[1] It added that it was in the absence of any available administrative remedy for the breach of the right asserted and where there was no mode of enforcement other than resort to the Courts, that such right was of judicial cognizance (ibid p. 207). Such reliance on the *Steele* case is misplaced.

First, the reliance by petitioners (p. 14) upon this Court's statement that Section 3, First (i), makes no reference to disputes between employees and their representative, underscores the difference between the *Steele* case and ours. Here, there may be a dispute with the Brotherhood lurking in the background, but the action is sought to be enjoined was the carrier's independent decision, and no effective relief and no damages are sought against the Brotherhood.

Second, the fact now is, as this Court knows from its consideration of the *Wyer* case, that the Board, no doubt guided by *Steele*, has since the latter decision, accepted and

[1] Petitioners in the instant case were eligible for membership in the Brotherhood. UROC, contrary to the negro firemen who were unorganized, could have sought representation on the Adjustment Board, and recently has done so as revealed in the appeal before the Company herein.

decided grievance claims submitted by employees not represented by any union and also claims submitted by unions other than those participating in the selection of members of the Board.[1]

Third, as to the effectiveness of the remedy, the Board can and now does grant relief against wrongful discharges by awarding reinstatement with back pay (pp. 12-13, *supra*).

Fourth, there are presented here questions of interpretation or application of the agreement (pp. 13-16, *supra*).

d. *The alleged discrimination of the Brotherhood is not a basis for conferring jurisdiction on the Courts.*

The courts below distinguished between the discrimination in the *Steele* case and that alleged in ours. In the former this Court was dealing with discrimination compelled by the contract and based on race alone, which was obviously irrelevant and invidious and violated constitutional guarantees. In our case, the alleged "discrimination" relates rather to differences in a discretionary restoration to membership on a leniency basis. In the administration or policing of agreements, as well as in their negotiation, there is room for variation by the union and the carrier in the treatment of those affected, based on differences

[1] Since 1948 the First Division has accepted petitions filed by labor organizations which did not participate in the selection of the labor members of the Board, and since 1950 has accepted petitions of individual employees. During the last four years the Board has docketed a total of 60 cases submitted by individuals (Annual Reports of the National Mediation Board and National Railroad Adjustment Board: 1951 p. 85, 1952 p. 73, 1953 p. 70, 1954 p. 67). UROC itself filed 10 submissions during the year ending June 30, 1954. During the four-year period ending June 30, 1954, fifty-six submissions were filed by unions which do not participate in the selection of board members, such as United Steelworkers of America (CIO); Colored Trainmen of America; and Railroad Industrial Union; (Annual Reports of the National Mediation Board: 1951 p. 85; 1952 p. 73; 1953 p. 70; and 1954 p. 67).

relevant to the authorized purposes of the contract. These differences in the treatment of petitioners as compared with others as alleged in the complaint plainly fall within this category, for the petitioners do not allege that those reinstated were identical in their interest or merit. There is no allegation that any of such other employees maintained their refusal to rejoin the Brotherhood until after they had received notice of their discharge, or for so long a period, or what their lesser "activity" in UROC was, e.g., whether their opposition to maintenance of membership and activity in UROC was directed to "undermining" the union shop agreement. Neither the contract nor the Railway Labor Act requires the Brotherhood or Company to waive a default in maintenance of membership. If this were required and non-complying members of the craft had the right to reinstatement to membership irrespective of their activity in the interim, the effectiveness of the agreement would be destroyed. We have no hesitation in saying that such would encourage inter-union rivalry, impair morale, and create intense dissatisfaction on the part of those who had continuously maintained their membership. In the administration of collective agreements in the industry, many situations arise where it is necessary for the union officers to interpret the agreements and seniority arrangements whereby certain employees are held entitled to perform certain work in preference to others. In some cases, those not preferred become disgruntled. If, on these occasions, it were possible for a union member to withdraw from the union, allege discrimination, remain in default, and rejoin only when faced with an order of discharge, irreparable damage would result to the administration of union shop agreements. All these factors are pertinent for the Adjustment Board, skilled in railroad labor relations, to consider.

e. *The Adjustment Board has jurisdiction to decide any questions of law involved in the interpretation or application of the union shop agreement.*

Petitioners may attempt to raise, as was done in other UROC cases, the transparently specious contention that the transfer of membership provisions of Section 152, Eleventh (c) (and Section 2 of the agreement, R. 14) do not require maintenance of membership in a national in scope organization (Petition p. 29, note 9). The Court of Appeals found this to be frivolous (R. 92) and the District Court pointed out that maintenance of membership in a qualified organization was implied in the transfer provision (R. 40-41). However, as the Court of Appeals held, even if questions of statutory construction do arise in the interpretation or application of the agreement, there is no reason why the Board should not consider and decide them (citing *Johns v. B. & O. R. Co.*, 118 F. Supp. 317, and affirmance 347 U.S. 964; *UROC v. Nor. Pac. R. Co.*, 208 F. 2d at 138). Congress has often committed such questions to administrative bodies, including those set up by the Railway Labor Act. *Switchmen's Union v. National Mediation Board*, 320 U.S. at 303; *General Committee BLE v. Southern Pac. Co.*, 320 U.S. at 342-343.

2. THERE IS NO CONFLICT WITH THE DECISION OF THE COURT OF APPEALS WITH ANOTHER COURT OF APPEALS.

All of the Courts of Appeals have uniformly held that disputes concerning the rights and grievances of employees under a railroad union shop agreement, and the interpretation or application of such an agreement, are for the National Railroad Adjustment Board.

Hargrove v. Brotherhood of Locomotive Engineers (U.S. D.C. Dist. Col.), 116 F. Supp. 3, decided on motion to dismiss in a case still pending in that Court, does not detract

from these decisions. There, the case, at the time the motion was decided, was one solely for damages against the Brotherhood (pp. 3-4, 6), which is a subject over which the National Adjustment Board does not have jurisdiction. The Court further found that no question of interpretation (p. 6) but only a question of the alleged illegal cancellation of an agreement (p. 7) was involved. *Hargrove* thus has no applicability to the instant case.[1]

3. No Important Question of Federal Law is Presented Which Should be Settled by this Court.

In view of the well settled principles of federal law here involved, there is no reason for this Court to review the instant case.

The case is an aftermath of disputes which arose shortly after the union shop amendment was adopted, when certain employees, working under the relatively few union shop agreements which have been made covering the crafts of railway operating employees, joined UROC and abandoned their membership in the contracting organizations, relying upon the assumption that UROC was "national in scope." The forum and remedies for the "national in scope" issues have been settled by other UROC litigation, and all employees are presumed to have knowledge of their rights with respect thereto.

Our case, which arose out of such initial "national in scope" controversies, presented only a variant of the other

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[1] In the application of the *Steele* doctrine, our case is analogous to the *Spires* case where the Court of Appeals, in holding that the case was one for the Adjustment Board, noticed not only a question of contract interpretation, but also pointed out the claim, overlooked by Judge Pine in his analysis of the latter case, that the railroad's action was brought about as a result of pressure exerted by the Brotherhood, "which, it was alleged, had acted 'deliberately and maliciously * * * for the benefit of its members and to the detriment of plaintiffs'." 204 F. 2d at 454.

UROC cases, involving six employees on one railroad. The circumstances here and in any others of these initial disputes are not likely to recur, for the decision of the District Court has drawn attention to the fact that those who desire to join or remain in UROC or any other "new" union are protected against union shop discharges by maintaining membership in the contracting organization. There is nothing unfair or onerous in this requirement. It does not more than carry out the purpose of the union shop amendment which is to require each employee to contribute his part to the bargaining representative's activities on his behalf.

There are no constitutional questions here, and only narrow issues of less than national concern.

CONCLUSION

Wherefore, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: August 15, 1955

APPENDIX

THE RAILWAY LABOR ACT, AS AMENDED.
(U. S. Code, Title 45, Chapter 8)

§151a. *General purposes.*

"The purposes of this chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, C. 347, §2, 44 Stat. 577; June 21, 1934, C. 691, §2, 48 Stat. 1186.

§152. *General duties — Duty of carriers and employees to settle disputes.*

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own

choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Notice of manner of settlement of disputes; posting.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places

as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Union security agreements; check-off.

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not

including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent

of such conflict amended. May 20, 1926, C. 347, §2, 44 Stat. 577; June 21, 1934, C. 691, §2, 48 Stat. 1186; June 25, 1948, C. 646, §1, 62 Stat. 969; Jan. 10, 1951, C. 1220, 64 Stat. 1238.

§153. *National Railroad Adjustment Board — Establishment; composition; powers and duties; divisions; hearings and awards.*

First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six-members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in a case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent.

Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organization of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged

in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreement concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this sectior, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award.

Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting

forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such unit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(r) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(s) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(t) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(u) The Adjustment Board shall meet within forty days after the approval of this Act and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(v) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this Act, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this Act and disbursed by such agencies, employees, and officers.

(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board.

Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes, and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, or referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board.

Establishment of system, group, or regional boards by voluntary agreement.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board. May 20, 1926, C. 347, §3, 44 Stat. 578; June 21, 1934, C. 691, §3, 48 Stat. 1189."

End.